Let me turn now to the second submission that was made. It was submitted that so far as charge 1 is concerned, the conspiracy to defraud, this is an offence unknown to the law of Brunei. The basis of the argument is that if section 120(A) is considered, defrauding is not an offence known to Brunei law, it is not within the Code, and therefore this must be an agreement to do an illegal act, together with an act done in pursuance of it.

An answer to this submission lies, in my judgment, in the definition section, section 43, the definition of the word "illegal":

"The word 'illegal' is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action."

It is criticized because the words "which furnishes ground for a civil action" could be extraordinarily wide, but I must deal with the offence which is before the court and so far as this charge is concerned and drafted, I have no doubt whatsoever that the allegation of defrauding is a matter which furnishes ground for a civil action and that this is an offence which, as alleged, comes within the Code and I take the point that the essence of a conspiracy is the fact that a number of people joined together to carry out their illegal purpose. So I reject that submission.

Mr. Palakrishnan finally submits that it is unfair to the accused to try all these conspiracies together because they overlap – the allegations in some of them overlap with the other. Of course, when a conspiracy is charged the court has to be very jealous to ensure that no charges are made so as to put the defence into such difficulties because of their multiplicity of allegations that it becomes unfair to the defence; I will bear that in mind but so far as these offences are as charged now, these charges cover different aspects of the prosecution case and allegations and they are in my judgment properly joined and there is no injustice at present in their being joined although of course, it is open to counsel always to make submissions on these lines at any stage of the proceedings. I reject that submission as well.

Order accordingly.

Solicitors: *Bonds; Szeto & Co.; Palakrishnan & Partners; Clifford Chance; Bikram & Co.*

MALAYSIAN REPORTS

DIRECTOR-GENERAL OF INLAND REVENUE v. HARRISONS & CROSFIELD (M) SDN. BHD.

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 9 March & 23 April 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 34 of 1987]

Revenue Law – Additional remuneration scheme – Whether additional remuneration under the scheme is to be considered as bonus – Company paying senior staff monthly salary including additional remuneration under additional remuneration scheme – Liability to income tax – Deduction – Income Tax Act 1967, ss. 39.

In this case, the respondent company paid to its senior executives and managerial staff a monthly salary including additional remuneration under the additional remuneration scheme. The additional remuneration was based upon a percentage of the combined audited profits of the respondent company. The junior executives and non-managerial staff of the respondent company were not paid the additional remuneration but were paid a bonus at the discretion of the company. The Inland Revenue regarded the additional remuneration as bonus and disallowed deduction in excess of 2/12 of the employee's wages and salaries in respect of the additional remuneration. The respondent company appealed to the Special Commissioners of Income Tax and it contended that the additional remuneration paid to the senior executives is not bonus but should be regarded as either commission or deferred salary. The question before the Special Commissioners was therefore whether the payment of the additional remuneration under the additional remuneration scheme of the respondent company was bonus for the purposes of section 39(1)(h) of the Income Tax Act 1967. The Special Commissioners by a majority decided in favour of the Inland Revenue. On appeal to the High Court, Harun J. disagreed and allowed the appeal (see [1987] 2 M.L.J. 384). The appellant appealed.

Held, allowing the appeal: (1) to determine whether a payment is a bonus, we have to go behind the label and seek its true character;

(2) the question posed in this case is a narrow one, *i.e.* whether the additional remuneration is a bonus in character although it is called additional remuneration and not bonus. The answer is that it is a bonus and is caught by section 39(1)(h) of the Income Tax Act 1967.

Cases referred to:

(1) *Director-General of Inland Revenue* v. *Highlands Malaya Plantations* [1988] 2 M.L.J. 99 (folld).
(2) *Shelford* v. *Mosey* [1917] 1 K.B. 154 (refd).
(3) *Sutton* v. *Attorney-General* (1923) 39 T.L.R. 294 (refd).
(4) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11, 25 (refd).
(5) *Re Eddystone Marine Insurance Co.* [1893] 3 Ch. 9 (refd).
(6) *Great Western Garment Co.* v. *Minister of Inland Revenue* (1948) 1 D.L.R. 225 (refd).

SUPREME COURT.

Abdul Hamid bin Haji Mohamad (Senior Federal Counsel) for the appellant.

Michael K.L. Wong (*P.H. Yeo (Ms)* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the judgment of the court): The appeal before the learned judge (Harun J.) was by way of case stated against the majority decision of the Special Commissioners of Income Tax. The question before the Commissioners was whether the payment of the additional remuneration (A.R.) under the additional remuneration scheme of the respondent company was bonus for the purposes of section 39(1)(h) of the Income Tax Act. The Special Commissioners by majority decided in favour of Revenue. Harun J., however, disagreed and allowed the appeal. Hence the appeal before us.

The senior executives and managerial staff of the respondent company were paid a monthly salary which included the A.R. in question. By virtue of section 33 of the Income Tax Act, all outgoings and expenses wholly and exclusively incurred in the production of gross income is deductible. However, by virtue of section 39(1)(h) of the Act ("deductions not allowed"), if the sum paid to the employees is bonus, then not all such payment is deductible even though the amount is wholly and exclusively incurred for the production of income. As a result of the amendment to section 39(1)(h) of the Act in 1975 (Act A237 of 1975), no deduction from the gross income would be allowed in respect of any sum paid as bonus in excess of 2/12 of the employee's wages or salary.

In this case, Revenue had disallowed deduction in excess of 2/12 of the employee's wages and salaries in respect of the A.R. It is thus important for Revenue to be certain whether to classify the A.R. as "bonus" or, as contended by the respondent company, as "commission" or "deferred salary" for the purpose of applying section 39(1)(h) of the Income Tax Act.

The respondent company is a company incorporated in Malaysia. According to the primary facts as found by the Special Commissioners, the A.R. paid to the senior executives and managerial staff of the company was paid under the additional remuneration scheme formulated in 1935 which rules were revised in 1962. When the senior executive was first employed, he would receive a "fixed salary" and the A.R. under the scheme and this is so stated in his letter of appointment. According to the procedure followed by the respondent company, when the senior executive's tour of service was extended his level of the A.R. would be negotiated between him and the company. The amount agreed would be added to his increased "fixed salary" and the total would be shown in his contract of employment. It was also agreed that the "market value" of each senior executive would comprise his basic salary and, in addition, his A.R. The A.R. was based upon a percentage of the combined audited profits of the respondent company. Negotiation as to the rate under the additional remuneration scheme with each expatriate senior executive was done in London during his leave after his tour of service and as regards the local senior executive negotiation was done by correspondence with the London office of the company. For the year of assessment in question (1975), there were out of 450 executives of the company only 21 (20 expatriates and one local) senior executives who were paid under the additional remuneration scheme.

In respect of the junior executives of the respondent company, instead of receiving payment under the additional remuneration scheme referred to, they, together with the non-managerial staff, were paid bonus at the discretion of the respondent company. However, after four years of service, the expatriates who had served as junior executives for four years would be entitled to participate in the additional remuneration scheme. It was the practice of the company to pay the junior executives and the non-managerial staff an annual bonus of two months' salary. The senior executives participating under the additional remuneration scheme were not eligible to receive bonus paid to the junior executives and the non-managerial staff. They were not allowed to opt for the said bonus instead of the A.R. and neither were they allowed to receive a higher basic salary without the A.R.

The respondent company is not disputing that they were paying bonus to the junior executives and the non-managerial staff. What the company is contending is that the A.R. paid to the senior executives is not bonus but should be regarded as either commission or deferred salary. The contention that the A.R. is *not* bonus is based primarily on the fact that the payment of the A.R. is contained in the letter of appointment of the senior executives and therefore contractual. This was the argument which attracted the learned judge in the court

below and which formed the crux of his judgment. The learned judge in his judgment (p. 11) said that it would be a contradiction in terms to speak of a contractual bonus because bonus by definition is gratuitous. He then ruled that:

"In the context of section 39(1)(h) I am of the view that a distinctive feature that remuneration is not a bonus is if the payment is contractual."

The learned judge found that the A.R. was a contractual payment and formed a distinct component of the senior executives' remuneration.

The question whether a payment, if contractual, cannot be bonus was also posed to the Supreme Court in *Director-General of Inland Revenue* v. *Highlands Malaya Plantations Ltd.*[1] That appeal was also against the decision of the same judge in another appeal by way of case stated where the main issue was whether the additional remuneration paid to the managerial staff of a company under the group bonus scheme was bonus under section 39(1)(h) of the Income Tax Act. The question was whether the payment, being contractual, can be regarded as a bonus. There the Special Commissioners held that such contractual payment can be bonus but the learned judge disagreed. The Special Commissioners relied on *Shelford* v. *Mosey*[2] where the bonus payment was clearly contractual, and *Sutton* v. *A.G.*[3] where Lord Birkenhead stated that the term "bonus" may of course properly be used to describe payments made of grace and not as of right but it nevertheless may also include payments made because legally due but which the parties contemplate will not continue indefinitely.

We hold the same view that a payment can be a bonus even if contractual. It all depends on the nature or character of the payment. In *Highlands*, the company there used the word "bonus" to describe the payment in their correspondence. In the appeal before us, however, the respondent company never used the word "bonus" except in respect of payment to the junior executives and the non-managerial staff. The Income Tax Act does not define the word "bonus". This elusive question was dealt with succintly by Lee Hun Hoe C.J. (Borneo) in the judgment of the Supreme Court in *Highlands* as follows:

"It is difficult to lay down any general rule as to what 'bonus' is. Jowitt's *Dictionary on English Law*, 2nd Ed. Vol. 1 at p. 238 defines 'bonus' to mean premium or advantage; an occasional extra dividend; a gratuity. The Income Tax Act 1967 does not define the word 'bonus'. Both the learned judge and the Special Commissioners accepted 'bonus' to mean 'a boon or gift over and above what is normally due as remuneration to the receiver'. They were merely following what Stirling J. did in *Re Eddystone Marine Insurance Co.* ((1894) W.N. 30) when he said:

> 'I adopt the definition of 'bonus' given in the *New English Dictionary, viz.* 'a boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good'.

We are not unmindful that the label itself is not conclusive. Thus in *Commissioners of Inland Revenue* v. *Wesleyan And General Assurance Society*[4] the taxpayer sought to call an annuity a loan while the Revenue contended that it was an annuity and not a loan. The House of Lords decided that it was an annuity. At p. 25, Viscount Simon made the following observation:

> 'It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it.' "

To determine whether a payment is a bonus, we have to go behind the label and seek its true character. To determine the character of the A.R., it would be useful to begin with the sample of the letter of appointment of the senior executives of the respondent company and this appears at pp. 125-126 of the appeal record. The salary and additional remuneration scheme are described in the letter of appointment as follows:

"*Salary:* At the rate of M$2,100 per month. This salary includes an amount of M$400 per month consolidated from the additional remuneration scheme. (Please see below.)

Additional Remuneration Scheme: You would be entitled to participate in profits under the rules of the additional remuneration scheme at the rate of ¼% of the adjusted net profits of Harrisons & Crosfield (Malaysia) Sdn. Bhd.

The basis of participation of the staff as a whole is subject to review annually at 30 June and we must reserve the right to review individual rates at the same time. The amount of M$400 per month consolidated into basic salary is deductible from any amount of A.R.S. becoming due for payment."

Rule 5(a) and (c) of the rules of the scheme for additional remuneration (pp. 91 and 92 of the appeal record) read as follows:

"5.(a) The additional remuneration due to a recipient shall be a sum equivalent to a percentage of the profits of the

department, branch, or associated company in which he is engaged, as shown by the profit and loss accounts forwarded to Harrisons & Crosfield Limited in London, adjusted in accordance with rule 7. Such percentage shall be either a flat rate or a rate based on a datum line of profits, in which latter case additional remuneration in respect of profits in excess of such datum line shall be paid at a higher rate or lower than in respect of those up to that line. Provided that the additional remuneration payable shall in the case of every recipient be limited to such an amount as the appropriate Revenue authorities shall allow as a deduction from such profits for the purpose of any taxation levied in respect of such profits in any part of the world.

...

5.(c) Although the additional remuneration provided for under this scheme is equal to a percentage of the profits of the department, branch, or associated company concerned, the amount shall be paid to each individual as remuneration for services rendered by him outside the United Kingdom, and his fixed salary and additional remuneration under this scheme shall together form his total remuneration for the company's year in which the amounts are paid."

The following characteristics of the A.R. are revealed from the letter of appointment and the rules:

(1) The senior executives are entitled to participate in the profits of the company under the A.R. scheme.

(2) The basis of participation is, however, subject to review by the company annually.

(3) The A.R. is separate and distinct from the "fixed salary" of the senior executives.

(4) The fixed salary and A.R. constitute the total remuneration.

(5) The company reserved the right to review individual rates.

In *Re Eddystone Marine Insurance Co.*[5] (not a tax case) Stirling J. adopted the definition of "bonus" given in the *New English Dictionary, viz.* "a boon or gift over and above what is normally due as remuneration". In *Great Western Garment Co.* v. *Minister of National Revenue*[6], to ascertain whether payment was a bonus O'Connor J. applied the test whether it is something in addition to or in excess of what is ordinarily received. He then held that in the context of that case where a company passed a resolution providing for certain officials' salaries to be free of income tax, the "free of income tax" is not something in addition to or in excess of what is to be received but part and parcel of a salary.

Therefore although the market value of each senior executive of the respondent company would comprise his basic salary and in addition his A.R., the character of the A.R. makes it separate and distinct from the fixed salary and therefore cannot be regarded as a deferred salary. Secondly, although the additional remuneration scheme is a permanent scheme and under the rules the payment of A.R. itself is in that sense permanent, the A.R. was payable contingent upon the respondent company making a profit. Finally, the rate of A.R. is reviewable by the employer which the employer is not permitted to do with respect to the salary.

The senior executives were paid A.R. and the junior executives and the non-managerial staff were paid bonus based on profitability. The A.R. therefore is nothing more than a bonus and should be regarded in law as a bonus by a different name. The senior executives are not entitled to the A.R. and the junior executives and the non-managerial staff are not entitled to bonus if the company does not make a profit.

The question posed is therefore a narrow one – whether A.R. is a bonus in character although it is called A.R. and not bonus. Our answer is that it is bonus and caught by section 39(1)(h) of the Income Tax Act.

The appeal is accordingly allowed with costs.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

MINISTER OF RESOURCE PLANNING & ORS. v. KERUNTUM SDN. BHD.

[S.C. (Salleh Abas L.P., Seah & Hashim Yeop A. Sani S.C. JJ.) 10 February and 23 March 1988]

[Kuching – Supreme Court Civil Appeal No. 407 of 1987]

Administrative Law – Certiorari – Prohibition – Forest timber licence – Cancellation – Alleged breach of conditions of licence – Licence not automatically invalid – Opportunity not given to licensee to explain invalidating event – Forest Ordinance (Sarawak) (Cap. 126), ss. 2, 49, 51 & 55.

Forestry – Issue of licences – Licences declared non-transferable by Ordinance – Whether licence automatically invalid for breach of condition of non-transferability – Discretion of Director – Opportunity to be given to licensee to explain invalidating event – Forest Ordinance (Sarawak) (Cap. 126), ss. 2, 49, 51 & 55.

In this case, the Director of Forests had, with the approval of the Minister, issued a forest timber licence to